IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

MONDAY, THE 20TH NOVEMBER 2006 / 29TH KARTHIKA 1928

SA.No. 753 of 1993(F)

AS.18/1989 of ADDL.SUB COURT, ALAPPUZHA
OS.356/1985 of ADDL.MUNSIFF COURT, ALLEPPEY

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APPELLANTS/ ADDITIONAL APPELLANTS 2 TO 9/L.RS. OF DECEASED PLAINTIFF:

1. VISWAPPAN, S/O.NARAYANAN, THEKKATUPURAYIDOM, CHUNGOM WARD, ALAPPUZHA MURI, ALAPPUZHA EAST VILLAGE. *(DIED . L.RS IMPLEADED)*
2. MANOHARAN S/O.NARAYANAN OF DO-DO-
3. LEELA D/O.SARADA OF DO - DO
4. MANIYAPPAN, S/O.NARAYANAN, OF DO-DO
5. RAJU S/O.NARAYANAN OF DO-DO
6. BABU S/O.NARAYANAN OF DO-DO
7. REHTINAM D/O.SARADA OF DO- DO
8. USHA D/O.SARADA OF DO-DO

*9 BHASURA VISWAPPAN, AGED 40 YEARS, W/O.LATE VISWAPPAN OF THEKKATTUPURAYIDOM, CHUNGAM WARD, ALLEPPEY.

10 SINDJU T.V.AGED 24 YEARS, D/O.LATE VISWAPPAN DO-DO

11. T.V.SATHY, AGED 21 YEARS DO-DO
12. T.V.SEHTU AGED 21 YEARS DO-DO
13. T.V.SEEMA AGED 17 YEARS DO-DO
14. T.V.SATHISH, AGED 14 YEARSDO-DO

(13,14 ARE REPRESENTED THROUGH THEIR MOTHER – BHASURA VISWAPPAN AS GUARDIAN.

CONTD...

* THE ABOVE PERSONS ARE IMPLEADED AS THE LEGAL REPRESENTATIVES OF DECEASED 1ST APPELLANT AS PER ORDER DATED 26.10.95 ON CMP NO.1520/1995 VIDE ORDER IN MEMO C.F.3502/1995 DATED 26.10.95.

BY ADV. SMT. BINDU.C.G.

RESPONDENTS/PLAINTIFFS/DEFENDANTS

1. SARADA W/O.MADHAVAN, THEKKATTUPURAYIDOM, CHUNGOM WARD, ALAPPUZHA.

2. MADHAVAN KUMARAN OF DO-DO

3. SARADA RADHA OF DO-DO

4. MADHAVAN VIJAYAN OF DO-DO

5. MADHAVAN VINAYAKAN OF DO-DO

BY ADV. SRI.M.V.MATHEW

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 20/11/2006, ALONG WITH SA NO. 766 OF 1993 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

NONE APPEARS FOR THE APPELLANTS. HENCE THIS APPEAL IS DISMISSED FOR DEFAULT.

20.11.2006 SD/- THOTTATHIL B RADHAKRISHNAN,JUDGE

/TRUE COPY/

P.A.TO JUDGE

M.SASIDHARAN NAMBIAR, J.

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S.A.Nos.753 & 766 OF 1993

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DATED THIS THE 31st DAY OF JULY, 2007

JUDGMENT

The legal heirs of the plaintiff in O.S.356 of 1985 who were the defendants in O.S.684 of 1987 on the file of Munsiff Court, Alappuzha are the appellants. Respondents are the defendants in O.S.356 of 1985 and the plaintiffs in O.S. 684 of 1987. O.S.356 of 1985 was filed seeking a decree for fixation of boundaries separating three cents of the property which according to the plaintiff belong to the respondents as kudikidappu and for a perpectual injunction restraining respondents from trespassing into the remaining portion of the plaint schedule property. O.S.684 of 1987 was filed by the respondents seeking a decree for permanent prohibitory injunction restraining plaintiff in O.S.356 of 1985 from trespassing into the plaint schedule property. The plaint schedule property in O.S.684 of 1987 is 7 cents of property which is part of the 30 cents which is the plaint schedule property in O.S.356 of 1985. Appellants contended that the plaint schedule property belongs to Paliyath Tarwad and under Ext.A4 verumpattom lease it was in the possession of the maternal grandfather of the plaintiff, Kochukrishnan and

subsequently Velayudhan obtained the property as per document 3089/1121 M.E and the said properties were divided under a partition deed and the property was alloted to the share of Dr.Prasanna Kumari who also purchased the jenmom right from the Paliyath Tarwad under Ext.A2 jenmom assignment deed and while she has been in possession of the property it was sold under Ext.A1 sale deed in 1992 in favour of the plaintiff and plaintiff has therefore title to the plaint schedule property. It was contended that on the south eastern corner of that property, there was a kudikidappu occupied by Madhavan. Plaintiff has admitted the kudikidappu right over 3 cents of property in favour of respondents being the successor in interest of Madhavan. A decree was sought in respect of the remaining extent of the plaint schedule property. Decree was also sought to fix the boundary excluding the said 3 cents of kudikidappu and for a permanent prohibitory injunction in respect of the remaining property. Respondents in their written statement as well as in the plaint in O.S.684 of 1987 contended that the plaint schedule property therein namely 7 cents was purchased by Madhavan, their predecessor in interest under Ext.B1 sale deed on 28.10.1973 and the assignor Abdulla obtained that right as per

Ext.B2 assignment deed executed by Hawva Umma and others who obtained the right as legal heir of Mammu who in turn obtained that right under Ext.B3 and therefore plaintiff in O.S.356 of 1985 is not entitled to the decree in respect of the said 7 cents and the plaintiff is not entitled to trespass into the plaint schedule property.

2. Learned Munsiff, on the evidence of PWs 1 & 2 and Dws 1 to 3, and Exts.A1 to A5, Exts.B1 to B4 and Exts.C1 to C3 found that 7 cents of the property, which is part of the property claimed by the plaintiff in O.S.356 of 1985, was outstanding in the possession of Mohammed which was assigned in favour of Mammu and thereafter to Abdulla and Madhavan under Ext.B1 to B4 documents and plaintiff in O.S.356 of 1985 did not obtain right over the said property. It was therefore held that plaintiff in O.S.356/1985 is not entitled to the decree sought for. Upholding the claim of the plaintiffs in O.S.684 of 1987, a decree for permanent prohibitory injunction was granted. It was challenged before Sub Court, Alappuzha in A.S.17 of 1989 and 18 of 1989. A.S.18 of 1989 was filed against the decree and judgment in O.S.356 of 1985 and A.S.17 of 1989 was filed against the decree and judgment in O.S.685 of 1987. The

learned Sub Judge on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed both the appeals. The said common judgment is challenged in these appeals.

3. S.A.753 of 1993 is filed against the concurrent decree and judgment in O.S.356 of 1985 and S.A.766 of 1993 is filed against the concurrent decree and judgment in O.S.684 of 1987. Both the appeals were admitted formulating the following substantial questions of law:

1)Whether the courts below were justified in not fixing the boundary in accordance with Ext.A1, A2 and A4.

2)Whether respondents can claim declaration of title as well as title by adverse possession.

3)Whether without producing the prior document respondents could succeed in establishing their title to the property.

4. Learned counsel appearing for the appellant and respondents were heard. The argument of the learned counsel appearing for appellant is that the courts below did not properly appreciate the case and when the plaintiff in O.S.356 of 1985 established right from 1099 M.E under Ext.A4 and that the property was outstanding in the possession of the predecessor in interest of the plaintiff and under Ext.A1 the jenmom right was

also purchased under Ext.A2, courts below should have upheld the case of plaintiff and should not have accepted the case of the respondents without establishing the right of Chekutti Impichi Vadakkan Ahammad Koya. It was argued that there is no document to establish the right of Chekutti Impichi Vadakkan Ahammad Koya under whom Pulikkakaathu Kunjammutty Vadakkan Mohammed obtained the property which was transferred under Ext.B3, which was subsequently obtained under Ext.B2 by Abdulla and claimed by respondents under Ext.B1 and therefore courts below should have granted the decree in favour of the plaintiff in O.S.356 of 1985. The learned counsel also argued that in the written statement filed by respondents in O.S.356 of 1985 they admitted the kudikidappu right and in the light of that admission, they cannot claim right over 7 cents of property under Ext.B1 and therefore courts below should have found that respondents have only kudikidappu right which is restricted to 3 cents, which was conceded by plaintiff in the plaint in O.S.356 of 1985 and so a decree for fixation of the boundary separating the 3 cents covered by the kudikidappu should have been granted by the courts below and in any event courts below should not have

granted the decree for declaration of title in O.S.684 of 1987.

5. Learned counsel appearing for respondents argued that the respondents have produced the original documents from 1108 onwards and the evidence establish that 7 cents of the property covered under Ext.B1 has been in the possession of Muhammed and thereafter Mammu and on the death of Mammu, Hawva Umma his widow and children transferred the right under Ext.B2 in favour of Abdulla and under Ext.B1 that right was assigned in favour of Madhavan the predecessor in interest of the respondents and hence courts below rightly granted the decree in their favour and there is no reason to interfere with the decree and judgment passed by the courts below.

6. The title claimed by the appellants is under Ext.A1 which in turn was obtained from Dr.Prasannakumari. The right claimed by Dr.Prasannakumari is the right obtained under Ext.A2 sale deed, whereunder the jenmom right available with Paliyath Tarwad was transferred in favour of Dr.Prasannakumari after she got the right as per a partition in their family. The right obtained by Prasannakumari in the partition is the right which was obtained by Velayudhan as per the lease of 1121 M.E. The case of the appellants is that even earlier, as per

Verumpattom lease of 1099 evidenced by Ext.A4, the property was in the possession of Kochukrishnan and thereafter under Ext.A2 the entire right was obtained by the appellants and the courts below should have granted the decree sought for in O.S.356 of 1985. Courts below found that apart from producing the registration copy of the documents, the appellants did not produce the original documents to prove the title claimed by them and respondents have produced the original documents right from 1108 to prove that 7 cents of the property claimed by them was outstanding in the possession of Muhammed which was transferred in favour of Mammu under Ext.B3 and under Ext.B2 that right was transferred by the legal heirs of Mammu, viz, Hawva Umma and others in favour of Abdulla which was ultimately purchased by Madhavan under Ext.B1. Ext.B4, the original mortgage deed executed by Hawva Umma before the property was transferred under Ext.B2 in favour of Aboobaker was also produced. Courts below on the evidence, found that from 1108 onwards under Ext.B3, 7 cents claimed by the respondents was outstanding in the possession of Muhammed and by change of hands it vested on Madhavan under whom respondents claimed the property. Even though the said 7 cents

is part of the property claimed by appellants, in O.S.356 of 1985 unless it is established that either Kochukrishnan under Ext.A4 or Velayudhan under the lease of 1121 ME obtained the entire 30 cents covered under Ext.A1, and then was Prasannakumari the assignor under Ext.A1, had title appellants are not entitled to the decree for fixation of the boundary on the basis of Ext.A1. Courts below, on the evidence found that there is no evidence to prove that Prasannakumari obtained right over the 30 cents of the property. Ext.A2, the assignment deed whereunder the jenmom right was purchased by Dr.Prasannakumari, does not reveal that the property was outstanding in her possession under Ext.A4 lease. Instead what was stated in Ext.A2 is that the property was outstanding in the possession under the lease of 1121 M.E which was partitioned as per partition deed 1957. The said lease deed 3089/1121 was not produced to show what exactly was the property that was obtained by Velayudhan. So also the registered partition deed of 1957 whereunder the properties were subsequently divided and alloted to the share of Dr.PrasannaKumari was also not produced. When Exts.B1 to B4 establish that the 7 cents out of the property covered under Exts.A1 and A2 was outstanding in the possession of Mohammed,

Mammu and others, neither Velayudhan nor Dr.Prasannakumari could have obtained possession of the said property and if so the plaintiff in O.S.356 of 1985 could not claim right over that property.

7. Arguments of learned counsel for appellants was that as respondents did not produce the prior documents under which the assignor of Ext.B3 obtained the property and hence the residuary title was not proved and hence respondents are not entitled to the decree granted, appellants cannot raise such an argument. If property was outstanding on lease under Ext.A4, then Velayudhan, under whom rights under the partition deed was claimed by Dr.Prasannakumari ,could not have obtained any right. When under Ext.A2 the right is what was assigned under lease deed of 1121 ME right under Ext.A4 could not survive. If that be so without producing either the document 3089 of 1121 ME or the partition deed of 1957, appellants are not entitled to find fault with respondents for not producing the documents prior to Ext.B3.

8. On the evidence courts below rightly found that Madhavan had title to the property under Ext.B1 and plaintiff in O.S.356 of 1985 has no right over the disputed 7 cents of

property. Hence plaintiff in O.S.356 of 1985 is not entitled to the decree sought for in O.S.356 of 1985. In the light of the evidence, courts below rightly granted the decree sought for by respondents in O.S.684 of 1987. I find no merit in the appeals. The appeals are dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-